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# Florida v. Jardines: Trespassing on the Reasonable Expectation of Privacy

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# *FLORIDA V. JARDINES*: TRESPASSING ON THE REASONABLE EXPECTATION OF PRIVACY


## ABSTRACT

The Fourth Amendment affords an individual's home robust protections from unreasonable searches. After all, the home is a highly private locus and deserves heightened protections because it is where our most personal and intimate activities occur. By finding in favor of the individual in *Florida v. Jardines*, the United States Supreme Court did not question this critical principle; a majority of the Justices concluded that absent a warrant, the police cannot bring a drug-sniffing dog into a home's curtilage to search for narcotics. The *Jardines* Court premised its decision on property and trespass law, determining that there had been a per se violation of the Fourth Amendment because the police gathered evidence by physically intruding onto Mr. Jardines' front porch.

However, the majority's sole reliance on property law rendered its ruling incomplete. As Justice Kagan aptly noted in her concurring opinion, it would have been equally as appropriate to use privacy doctrine to resolve the case. The majority's purposeful disregard of that critical analysis leaves important questions unanswered and threatens to diminish Fourth Amendment protections.

This Comment argues that the Court in *Florida v. Jardines* should have included an analysis of privacy doctrine and then discusses some of the implications that arise from its absence. Although the individual prevailed in *Jardines*, the majority's narrow focus on property and trespass law ignored an opportunity to overrule questionable cases and failed to create broadly applicable precedent. Furthermore, the decision threatens to diminish the Fourth Amendment protections of individuals who do not live in single-family detached homes with accompanying property rights. Lastly, the majority's neglect of a privacy analysis may send the message that it is unworthy of consideration, and may therefore limit the future application of critical privacy doctrine.


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## INTRODUCTION

The Fourth Amendment provides, in part, that citizens have a right to be free from unreasonable searches.[1] A Fourth Amendment search occurs when the government infringes on an individual's reasonable expectation of privacy[2] or "[w]hen 'the [g]overnment obtains information by physically intruding' on persons, houses, papers, or effects."[3] As a check against abusive government power, a search generally "requires a warrant that is based on probable cause."[4] If, however, the subject of the search does not have a reasonable expectation of privacy and the government does not commit an intrusion, then no warrant is required and for the "purposes of the Fourth Amendment . . . no search occurs."[5] Such a system naturally creates tension between governmental police power and individual rights.[6] In attempting to balance these often competing interests, the Supreme Court must walk a fine line that preserves both.[7]

*Florida v. Jardines*,[8] a 2013 Supreme Court decision, addressed whether police use of a drug-sniffing dog on the front porch of a house was a search subject to Fourth Amendment protections.[9] The majority

1. U.S. CONST. amend. IV.
2. Michael Mayer, *Keep Your Nose out of My Business—A Look at Dog Sniffs in Public Places Versus the Home*, 66 U. MIAMI L. REV. 1031, 1033 (2012).
3. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (quoting United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)).
4. Brian L. Porto, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. FED. 399 (2005).
5. *See* California v. Greenwood, 486 U.S. 35, 39–42 (1988); Mayer, *supra* note 2, at 1033.
6. *See* Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 584 (1989).
7. *Id.*
8. 133 S. Ct. 1409 (2013).
9. *Id.*

concluded that a warrantless sniff search targeting the interior of the home but conducted from the front porch violated the Fourth Amendment.[10] However, the majority utilized property and trespass law instead of privacy-rights doctrine to reach its decision.[11] This property-based approach for deciding a dog-sniff case departed from most modern precedent[12] that had relied on privacy doctrine.[13] By purposefully neglecting to address an individual's reasonable expectation of privacy, the majority in *Jardines* failed to clarify or address the critical privacy concerns present when dog sniff searches are aimed at residences. Consequently, the *Jardines* decision threatens to diminish Fourth Amendment protections for those citizens who do not live in single-family detached houses.

This Comment progresses in three parts. Part I addresses prior dog-sniff and recent Fourth Amendment cases and provides context for the *Jardines* decision. Part II summarizes *Jardines*' facts, procedural history, majority, concurring, and dissenting opinions. Part III explores and critiques the majority's rationale. It examines whether *Jardines* effectively overrules prior dog-sniff and Fourth Amendment search cases, and discusses *Jardines*' potential implications for Fourth Amendment privacy rights. Finally, this Comment posits that although the Court's opinion resulted in a victory for Mr. Jardines, the majority's sole reliance on property rights rendered the analysis incomplete and thus threatens to reduce the Fourth Amendment protections *Jardines* purportedly safeguards.

## I. BACKGROUND

### *A. Modern Fourth Amendment Jurisprudence*

The Supreme Court's 1967 decision in *Katz v. United States*[14] transformed Fourth Amendment doctrine and ushered it into the modern era.[15] *Katz* departed from a narrow and literal text-based interpretation of *search*, defined the term more broadly,[16] and suggested that future analysis proceed "on a case by case basis."[17] Deciding it was no longer limited to a dictionary definition[18] and an old property and trespass analysis,[19]

10. *Id.*

11. *Id.* at 1417.

12. *Contra* United States v. Jones, 132 S. Ct. 945, 951–52 (2012) (providing a recent example of the Court relying on a property analysis to answer a Fourth Amendment search question).

13. *Compare Jardines*, 133 S. Ct. at 1417 (basing the majority opinion on only a property law analysis), *with* Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) (using a privacy doctrine analysis to determine that a sniff search of the outside of a lawfully stopped car did not violate the Fourth Amendment), *and* United States v. Place, 462 U.S. 696, 707 (1983) (relying on privacy doctrine to conclude that a dog sniff of luggage did not violate the Fourth Amendment).

14. 389 U.S. 347 (1967).

15. *See* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 704–05 (2011).

16. Serr, *supra* note 6, at 588–89, 593.

17. Mayer, *supra* note 2, at 1033.

18. Serr, *supra* note 6, at 591.

the *Katz* Court liberally construed *search* to mean any action taken by the government that breached a citizen's reasonable expectation of privacy.[20] Justice Stewart, writing for *Katz*'s majority, explained, "[T]he Fourth Amendment protects people, not places," including "what[ever an individual] seeks to preserve as private, even in an area accessible to the public."[21] Using this analysis, the Court determined that the government's warrantless monitoring of Mr. Katz's conversation in an enclosed telephone booth violated the Fourth Amendment because Mr. Katz sought to keep his conversation private.[22] However, the majority also noted that the Fourth Amendment does not protect activity voluntarily exposed to the public, even if such activity occurs within a home or private area.[23] Justice Harlan's concurring opinion helped clarify the Court's ruling.[24] Recognizing the predominantly subjective nature of the majority's new test (i.e., "whether an individual has knowingly exposed something to the public or sought to preserve it as private"),[25] Justice Harlan established a twofold requirement for determining if the government has violated an individual's Fourth Amendment rights.[26] "[F]irst[,] that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that . . . is . . . 'reasonable.'"[27] This reasonable expectation of privacy interpretation became the accepted and prevailing view, and has served as the foundational analysis in almost all modern Fourth Amendment search cases.[28] *Katz* and Justice Harlan's two-pronged approach remain, to this day, good law.[29]

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19. Marceau, *supra* note 15, at 704. Prior to *Katz*, "the governing principle of Fourth Amendment law . . . was predicated on . . . property rights." *Id.* at 702. The Court's infamous decision in *Olmstead v. United States* demonstrated how the Court exclusively protected physical property rights. Olmstead v. United States, 277 U.S. 438, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967). The Court ruled in *Olmstead* that federal agents' warrantless wiretaps on Mr. Olmstead's home and office telephones did not violate the Fourth Amendment because the wiretaps were not invasions of physical material interests. *Id.* Rather, the Court concluded that phone conversations were intangible and therefore incapable of suffering physical invasions. *Id.* The Court has also historically held that there is a per se violation of the Fourth Amendment when the police trespass to search and obtain information. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 509–10 (1961). The Court in *Silverman* found a violation of the Fourth Amendment not because the police unreasonably invaded Silverman's privacy rights, but because their search "was accomplished by means of an unauthorized physical penetration into the premises occupied by [Silverman]." *Id.* at 509.

20. Mayer, *supra* note 2, at 1033.

21. Katz v. United States, 389 U.S. 347, 351 (1967).

22. *Katz*, 389 U.S. at 352 ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."); Serr, *supra* note 6, at 592.

23. *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); Serr, *supra* note 6, at 592.

24. *Katz*, 389 U.S. at 360–62 (Harlan, J., concurring); Serr, *supra* note 6, at 592.

25. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); Serr, *supra* note 6, at 592.

26. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

27. *Id.*

28. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 27 (2001) ("In assessing [searches], the Court has adapted a principle first enunciated in *Katz v. United States* . . . ."); California v. Greenwood, 486 U.S. 35, 39 (1988) (explaining that there would be a Fourth Amendment violation "only if respondents manifested a subjective expectation of privacy . . . that society accepts as objectively

*Oliver v. United States*,[30] a prominent Fourth Amendment case decided in 1984, used *Katz*'s exception for activity voluntarily exposed to the public's view to limit protection from searches.[31] The Court concluded that individuals do not have a reasonable expectation of privacy in privately owned but publicly accessible outdoor fields and open lands, even if the owner of those lands took reasonable precautions to limit the public's access.[32] Fences and no trespassing signs were, according to the majority, not enough to establish a reasonable expectation of privacy.[33] Open fields typically do not serve as a setting for private activities in the way that a home or office does. Nonetheless, by limiting the definition and application of what constituted a reasonable expectation of privacy, the Court weakened *Katz*'s subjective reasonableness standard.[34]

Soon after the *Oliver* decision, the Court rendered another significant opinion in *California v. Ciraolo*,[35] which again narrowed the definition of what constitutes a reasonable expectation of privacy.[36] The Court held that aerial surveillance of curtilage—the home's immediate surrounding land and fixtures—does not infringe on Fourth Amendment protections.[37] The majority employed *Oliver*'s rationale and reasoned that individuals who expose activities conducted within the curtilage to public view, even if only from above, forfeit any reasonable expectation of privacy.[38] Whereas *Oliver* dealt only with open fields far from the home,[39] *Ciraolo* seized upon the *Katz* exception for "knowingly expos[ed] to the public"[40] to conclude that a visual search aimed at curtilage, a traditionally protected area,[41] was permissible if that area was not

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reasonable"); California v. Ciraolo, 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy . . .' [supported by *Katz*'s] two-part inquiry . . . ." (citation omitted) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))); Smith v. Maryland, 442 U.S. 735, 740 (1979) ("[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions." (citations omitted)).

29. Serr, *supra* note 6, at 593. *Katz* remains good law notwithstanding the fact that *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013), and *United States v. Jones*, 132 S. Ct. 945, 949 (2012), have resuscitated the old property and trespass approach for examining Fourth Amendment searches.

30. 466 U.S. 170 (1984).

31. *Id.* at 179.

32. *Id.* at 182.

33. *Id.*

34. *See* Serr, *supra* note 6, at 597–98.

35. 476 U.S. 207 (1986).

36. *Id.* at 213–14.

37. *Id.*

38. *Id.* at 215.

39. Oliver v. United States, 466 U.S. 170, 179 (1984).

40. Katz v. United States, 389 U.S. 347, 351 (1967).

41. Florida v. Jardines, 133 S. Ct. 1409, 1414–15 (2013). Because curtilage has "ancient and durable roots" and is protected as a "branch[] and appurtenant[]" part of the house, Justice Scalia concluded that "the officers' investigation took place in a constitutionally protected area." *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 225 (1769)) (internal quotation mark omitted).

hidden from public view.[42] Although the police conducted their search in *Ciraolo* "in a physically nonintrusive manner" (so that no trespass occurred),[43] the Court's upholding of their visual invasion of curtilage nonetheless resulted in a move away from *Katz*'s robust protections.[44] After all, it is most likely reasonable for average citizens to expect that the police will not fly over their houses at low altitude and peer down into their patios and backyards.[45]

Unlike *Oliver* and *Ciraolo*, two of the Supreme Court's more recent and illustrative Fourth Amendment cases have found in favor of the individual and sustained protection from unreasonably invasive police searches.[46] *Kyllo v. United States*[47] accomplished this by applying *Katz*'s reasonable expectation of privacy test,[48] whereas *United States v. Jones*[49] upheld Fourth Amendment protections by returning to a property analysis.[50] In *Kyllo*, Justice Scalia, writing for the majority, held that the use of "sense-enhancing technology"—in this instance thermal-imaging technology only available to the government—to gather otherwise private information from the home constituted a search because it violated the heightened privacy expectations associated with the home.[51] He wrote that even if used from a public area, intrusive technology capable of viewing the activity inside a home invaded privacy rights and required a warrant and probable cause.[52] Both *Kyllo* and *Ciraolo* occurred without a physical trespass,[53] but *Kyllo* violated the Fourth Amendment because the thermal-imager's visual invasion of activity within the home went beyond *Ciraolo*'s mere visual invasion of activity within the curtilage.[54]

In *Jones*, the Court determined that attaching a Global Positioning System (GPS) tracking device to an automobile without a warrant violated the Fourth Amendment because a search occurs "within the original meaning of the Fourth Amendment" when "the [g]overnment obtains information by physically intruding" on persons or their property.[55]

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42. *Ciraolo*, 476 U.S. at 215.
43. *Id.* at 213.
44. *See* Serr, *supra* note 6, at 611–13.
45. *See id.*
46. *See* United States v. Jones, 132 S. Ct. 945, 950 (2012); Kyllo v. United States, 533 U.S. 27, 40 (2001).
47. 533 U.S. 27 (2001).
48. *Id.* at 40.
49. 132 S. Ct. 945 (2012).
50. *Id.* at 950. Although *Jones* was a victory for the individual, Justice Scalia, writing for the majority, disconcertingly deviated from the well-established *Katz* standard. *Id.* This deviation from the traditional privacy analysis was repeated again the following year in Justice Scalia's majority opinion in *Florida v. Jardines*. *See infra* Parts II.C, III.B–C.
51. *Kyllo*, 533 U.S. at 34.
52. *Id.*
53. *See id.* at 31–33; California v. Ciraolo, 476 U.S. 207, 213 (1986).
54. *See Kyllo*, 533 U.S. at 37–38. Justice Scalia noted, seemingly with disapproval, that the thermal-imager might disclose the "intimate" detail of "at what hour each night the lady of the house takes her daily sauna and bath." *Id.* at 38 (internal quotation marks omitted).
55. *Jones*, 132 S. Ct. at 958 n.3, 964 (Sotomayor, J., concurring).

However, Justice Scalia, again writing for the majority, declined to address whether such police action violated the *Katz* reasonable expectation of privacy standard.[56] Instead, he decided the case solely based on trespass law.[57] Although he noted that searches "remain[ed] subject to *Katz* analysis,"[58] Justice Scalia declined to "rush[] forward to resolve [*Katz* issues] here" because he felt that a privacy analysis would needlessly raise "thorny problems" given *Jones*' particular set of facts.[59]

However, Justice Sotomayor authored a concurring opinion specifically noting that in addition to the correctly applied property doctrine, the Court should have at least considered the *Katz* standard.[60] She questioned whether the use of a GPS tracking device to monitor the movements of an individual violated a citizen's reasonable expectation of privacy, and impliedly answered that it most likely did.[61] Yet, notwithstanding Justice Sotomayor's desire to include a privacy-rights analysis, *Jones* helped lay the foundation for the Court's return to a trespass analysis,[62] and served as important precedent for Justice Scalia's opinion in *Jardines*.[63]

### *B. The Supreme Court's Dog-Sniff Cases*

Prior to *Jardines*, the United States Supreme Court had never addressed the constitutionality of a drug-dog's warrantless sniff search performed within the curtilage of an individual's home. However, in *United States v. Place*[64] and *Illinois v. Caballes*[65] the Court did address the Fourth Amendment implications of when police dogs aimed their sniffs at objects other than a home. In both cases, the Court found that dogs sniffing for narcotics did not violate the Fourth Amendment.[66] *Place* held that use of a dog to sniff luggage at an airport was not a search because a sniff was less intrusive than a physical search of the luggage's contents and because the contents remained private.[67] Although the sniff disclosed the presence of narcotics, such disclosure was limited and "did not constitute a 'search' within the meaning of the Fourth Amendment."[68] Similarly, *Caballes* concluded that a dog sniff performed in the course of a traffic stop did not implicate privacy concerns.[69] The majority held that a dog sniff of the exterior of a car legally stopped on a public road did not

56. *Id.* at 950 (majority opinion).
57. *Id.*
58. *Id.* at 953 (emphasis omitted).
59. *Id.* at 954.
60. *Id.* at 955 (Sotomayor, J., concurring).
61. *See id.* at 956.
62. *See id.* at 949–50 (majority opinion).
63. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414, 1417 (2013).
64. 462 U.S. 696 (1983).
65. 543 U.S. 405 (2005).
66. *Id.* at 409–10; *Place*, 462 U.S. at 707.
67. *Place*, 462 U.S. at 707.
68. *Id.*
69. *Caballes*, 543 U.S. at 408–09.

breach an individual's reasonable expectation of privacy.[70] The Court in *Place* explained that reasonable expectations of privacy may be tied to "the manner in which the information is obtained."[71] Because in both cases the search occurred in a public area and did not constitute a physical intrusion (i.e., a trespass), the Court concluded that each search was reasonable and "[did] not rise to the level of a constitutionally cognizable infringement."[72]

### *C. Lower Courts' Treatment of Dog Sniffs Targeting Dwellings*

Several of the nation's lower courts have considered whether the Fourth Amendment protects against dog sniffs aimed at dwellings when the sniffs are conducted from the hallways and common spaces of hotels, apartments, and other multi-unit residences.[73] Although the United States Supreme Court has upheld certain Fourth Amendment protections for those who do not own their residences,[74] the lower courts' near unanimous conclusions have been that neither property law nor privacy rights protect residents living in multi-unit dwellings from dog sniff searches targeting their home but conducted from hallways or common areas.[75]

The United States Court of Appeals for the Eighth Circuit, perhaps unsurprisingly, did not afford an individual staying in a hotel room the same heightened privacy protections granted to someone residing in a single-family detached house.[76] Although people renting hotel rooms are entitled to privacy within the room,[77] the Eighth Circuit concluded that an expectation of privacy does not extend to the common hallway outside the room because it is open to the public and "traversed by many people."[78] As a result, a drug-sniffing dog patrolling the hallway and

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70. *Id.*

71. *Place*, 462 U.S. at 707.

72. *Caballes*, 543 U.S. at 409.

73. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1015–16 (8th Cir. 2010) (holding that a canine's drug-sniff from the publicly accessible hallway of an apartment building was not an unreasonable violation of privacy expectations); United States v. Roby, 122 F.3d 1120, 1124 (8th Cir. 1997) (holding that a drug-dog sniffing into rooms from a hotel corridor did not violate Fourth Amendment privacy rights); Fitzgerald v. State, 864 A.2d 1006, 1017–18 (Md. 2004) (holding that a drug-dog's sniff of the exterior of an apartment was not a search because the police and dog were lawfully located in the apartment building's common areas).

74. *See, e.g.*, Miller v. United States, 357 U.S. 301, 313 (1958) (holding that warrantless entry into an apartment is a Fourth Amendment violation); McDonald v. United States, 335 U.S. 451, 453, 456 (1948) (holding that a tenant in a rooming house had his Fourth Amendment rights violated when the police entered his room without a warrant).

75. *See supra* note 73; *contra* United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding that a drug-dog sniffing from the hallway into an apartment violated the Fourth Amendment because it infringed on the dweller's heightened expectation of privacy attached to his place of residence).

76. *See Roby*, 122 F.3d at 1124.

77. *Id.* at 1125 (concluding that "Mr. Roby had an expectation of privacy in his . . . hotel room").

78. *Id.*

detecting odors emanating from the rooms "does not contravene the Fourth Amendment" even though the dog is sniffing into private areas.[79]

Additionally, state and federal courts, with rare exception, do not afford apartment dwellers the same level of Fourth Amendment protection against dog sniffs[80] as the Supreme Court now affords residents of single-family houses.[81] Residents of apartment buildings do not have property rights in the hallways—the closest thing to curtilage in a multi-unit dwelling. Thus, unlike individuals living in detached single-family houses, apartment dwellers cannot grant or revoke licenses[82] to people or police dogs approaching their front doors.[83] Courts have also determined that, similar to hotel corridors, the quasi-public nature of hallways and common areas in apartment buildings diminishes or even eliminates a resident's reasonable expectation of privacy in those locations.[84] The rationale is that public access to hallways and common areas, even if only to a limited extent, necessarily reduces the resident's privacy expectation because anyone could be passing through.[85] The court in *Fitzgerald v. State*[86] clearly articulated that because "the apartment building's common area and hallways were accessible to the public," the dog sniff was not a search because the police were not trespassing or violating privacy rights.[87] *United States v. Scott*[88] similarly held that a sniff search of an apartment's front door was legal because the police and drug-sniffing dog were lawfully present in the hallway outside of the apartment and engaged in the course of "[o]fficial conduct that [did] not 'compromise any legitimate interest in privacy.'"[89]

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79. *Id.*

80. *See supra* note 73 and accompanying text; Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 831 (2009) (noting that the Second Circuit is the only federal circuit court to conclude that a dog sniff of a private residence is a search).

81. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

82. Historically, residents of detached single-family houses have had the power to grant or revoke licenses to others approaching their home, thereby controlling who can access their property. *See id.* at 1415. "A license may be implied from the habits of the country," McKee v. Gratz, 260 U.S. 127, 136 (1922) (citing Marsh v. Colby, 39 Mich. 626, 627 (1878)), but there also exists an "implicit license typically permit[ting] the visitor to approach the home." *Jardines*, 133 S. Ct. at 1415.

83. *See* United States v. Cephas, 254 F.3d 488, 494 (4th Cir. 2001); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).

84. *See, e.g.*, United States v. Brown, 169 F.3d 89, 92 (1st Cir. 1999) (citing United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998)) ("It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building."); Mayer, *supra* note 2, at 1043.

85. *See* Mayer, *supra* note 2, at 1043–44.

86. 864 A.2d 1006 (Md. 2004).

87. *Id.* at 1017–18.

88. 610 F.3d 1009 (8th Cir. 2010).

89. *Id.* at 1016 (quoting Illinois v. Caballes, 543 U.S. 405, 408 (2005)) (internal quotation marks omitted).

The only potential caveat in such cases, explained by the Sixth Circuit in *United States v. Heath*,[90] is that a heightened expectation of privacy may exist when apartment buildings are locked and only accessible to tenants.[91] Nonetheless, the expectation of privacy may be diminished if even just one resident of the building unlocks the doors and permits the police to enter.[92] If that occurs, the police presence becomes lawful, and they may search hallways and common areas and use dogs to sniff for drugs.[93]

## II. *FLORIDA V. JARDINES*

### *A. Facts*

On November 3, 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that Joelis Jardines was cultivating marijuana in his home.[94] One month later, Detective Pedraja and Detective Bartelt investigated the claim.[95] Franky, a drug-sniffing dog, accompanied Detectives Bartelt and Pedraja as they staked out Mr. Jardines' home.[96] After observing the home for fifteen minutes and not seeing any signs of activity, Detectives Pedraja and Bartelt, along with Franky, approached Mr. Jardines' house.[97] As Franky neared the residence he became excited, having detected one of the odors he was trained to recognize.[98] Seeing Franky agitated, Detective Pedraja "stood back," and Detective Bartelt gave Franky the full benefit of the six-foot leash so that the dog could freely ascertain the source of the odor.[99] Franky worked his way up onto Mr. Jardines' porch, ultimately settling at the base of the home's front door and signaling that this was the odor's origin and strongest point.[100] Detective Bartelt and Franky then retreated, and Bartelt notified Pedraja that Franky had positively indicated that narcotics were present.[101]

Based on Franky's discovery, Detective Pedraja quickly moved for and obtained a warrant to search Mr. Jardines' residence where, upon execution, the police discovered marijuana plants growing inside.[102] The

90. 259 F.3d 522 (6th Cir. 2001).
91. *Id.* at 534.
92. *See* United States v. Broadway, 580 F. Supp. 2d 1179, 1193 (D. Colo. 2008).
93. *See id.*
94. Jardines v. State, 73 So. 3d 34, 37 (Fla. 2011), *rev'g* 9 So. 3d 1 (Fla. Dist. Ct. App. 2008), *aff'd*, 133 S. Ct. 1409 (2013).
95. *Id.*
96. *Id.*
97. Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

police arrested Mr. Jardines and charged him with marijuana trafficking.[103]

*B. Procedural History*

Mr. Jardines argued at his trial that the use of a drug-sniffing dog positioned on his front porch was an unreasonable search under the Fourth Amendment.[104] The trial court held an evidentiary hearing on the matter,[105] ruled in favor of Mr. Jardines, and granted his motion to suppress the discovery of the marijuana plants.[106] The State appealed, and the Florida Third District Court of Appeal reversed the suppression ruling.[107] The court concluded that no illegal search occurred because a dog sniff did not require a warrant, the police had probable cause, and the discovery of the marijuana "was inevitable."[108] The Florida Supreme Court accepted a petition for discretionary review and overruled the Third District Court of Appeal's decision.[109] The Florida Supreme Court held that the use of Franky to investigate Mr. Jardines' house was a Fourth Amendment search unsupported by probable cause,[110] reasoning that the tip that Mr. Jardines was growing marijuana was unverified, uncorroborated, and from an unknown individual.[111] It therefore concluded that the warrant obtained in light of Franky's sniff search was invalid.[112] Furthermore, Florida's Supreme Court determined that the "'sniff test' . . . constitute[d] an intrusive procedure" and was a "'search' within the meaning of the Fourth Amendment."[113] The United States Supreme Court granted certiorari, taking up the question of whether the officers' and dog's behavior was a Fourth Amendment search.[114]

*C. Majority Opinion*

In a 5–4 opinion authored by Justice Scalia, the Court affirmed the Florida Supreme Court, concluding that police use of a narcotics sniffing dog "to investigate the home and its immediate surroundings" constituted a Fourth Amendment search.[115] In his opinion, joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, Justice Scalia focused his analysis

103. *Id.*
104. *Id.*
105. Jardines v. State, 73 So. 3d 34, 38 (Fla. 2011), *rev'g* 9 So. 3d 1 (Fla. Dist. Ct. App. 2008), *aff'd*, 133 S. Ct. 1409 (2013).
106. *Jardines*, 133 S. Ct. at 1413.
107. *Id.*
108. *Jardines*, 73 So. 3d at 38 (quoting State v. Jardines, 9 So. 3d 1, 10 (Fla. Dist. Ct. App. 2008)).
109. *Jardines*, 133 S. Ct. at 1413.
110. *Id.*
111. *Jardines*, 73 So. 3d at 54–55.
112. *Id.* at 55.
113. *Id.* at 49.
114. *Jardines*, 133 S. Ct. at 1414.
115. *Id.* at 1417–18.

on property rights, not privacy rights.[116] He found that a trespass occurred because the police "physically intrud[ed] on Jardines' property to gather evidence" without Mr. Jardines' consent.[117] Quoting *United States v. Jones*, Justice Scalia concluded that because any information gathered by warrantless physical intrusion was a per se violation of the Fourth Amendment, Mr. Jardines had undoubtedly been the victim of an illegal search.[118]

The majority found that an individual's right "to retreat into his own home and . . . be free from unreasonable governmental intrusion" stood at the "very core" of the Fourth Amendment's guarantee[119] that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[120] The Court recognized that the Fourth Amendment does not apply to all intrusions onto personal property,[121] but concluded that it does protect against physical invasions of "[t]he area 'immediately surrounding and associated with the home'" (i.e., the curtilage).[122]

Because curtilage includes the front porch, the Court considered whether the police committed "an unlicensed physical intrusion."[123] The majority decided that the police did commit such an intrusion because they entered Mr. Jardines' porch without his consent and engaged in something for which "[t]here [was] no customary invitation."[124] According to Justice Scalia, the implicit license that homeowners grant to visitors such as "Girl Scouts [or] trick-or-treaters" does not extend to trained narcotics dogs fishing for evidence.[125] He said that no customary license grants the police an invitation "to explore the area around the home in hopes of discovering incriminating evidence."[126] Therefore, the police and drug-dog exceeded the scope of their license[127] and unlawfully intruded onto Mr. Jardines' property.[128] The Court concluded that an illegal search occurred because the government obtained information by intruding into a constitutionally protected area without permission.[129] Acquir-

116. *Id.* at 1414, 1417.
117. *Id.* at 1417.
118. *Id.* at 1414 (quoting United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)).
119. *Id.* at 1412 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).
120. *Id.* at 1414 (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).
121. *Id.* (citing Hester v. United States, 265 U.S. 57, 59 (1924)).
122. *Id.* at 1412, 1414 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).
123. *Id.* at 1415.
124. *Id.* at 1415–16.
125. *Id.*
126. *Id.* at 1416.
127. *Id.* at 1415–16. Justice Scalia noted that the police are within the scope of their license if they merely approach the home, but that action above and beyond what "any private citizen might do" (such as bringing a dog onto your porch to sniff for drugs) exceeds the scope of their implied license because such action breaches "background social norms." *Id.* (quoting Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)) (internal quotation mark omitted).
128. *Id.* at 1416.
129. *Id.* at 1414.

ing information by such means automatically triggers property and trespass-based Fourth Amendment protections.[130] Consequently, Justice Scalia concluded that there was no need to examine whether the police violated Mr. Jardines' privacy rights under *Katz v. United States*.[131]

*D. Concurring Opinion*

Justice Kagan, joined by Justices Ginsburg and Sotomayor, wrote to emphasize that the police violated both Mr. Jardines' property rights and his privacy rights.[132] Mr. "Jardines' home was his property," but "it was also his most intimate and familiar space" and was protected by heightened privacy expectations.[133] The concurring opinion determined that the police infringed on Mr. Jardines' privacy because they employed "a super-sensitive instrument," i.e., Franky's nose, to detect what was not otherwise noticeable.[134] Justice Kagan concluded that this violated the "reasonable expectation of privacy" standard articulated in *Katz* because the police (literally) "nos[ed] into intimacies [Mr. Jardines] sensibly thought [were] protected from disclosure[.]"[135] Additionally, the concurring opinion reasoned that the use of such technology to see (or in this case to smell) into Mr. Jardines' intimate and private space clearly constituted an invasion of privacy consistent with the decision in *Kyllo v. United States*.[136] Justice Kagan likened Franky's advanced olfactory abilities to *Kyllo*'s thermal-imaging device.[137] She said that drug-sniffing dogs, like advanced thermal-imagers, are technologically advanced instruments not available to the public.[138] Therefore, their use to examine a home without a warrant amounts to an invasion of privacy.[139] Justice Kagan summed up her concurring opinion by reemphasizing that an inclusion of the *Katz* privacy analysis strengthened the majority's property approach and easily resolved the case.[140]

*E. Dissenting Opinion*

In his dissent, Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer, contended that the police neither violated Mr. Jardines' property rights by approaching his front door, nor his privacy

130. *Id.*
131. *Id.* at 1417.
132. *Id.* at 1418 (Kagan, J., concurring).
133. *Id.* at 1419.
134. *Id.* at 1418; *see* Kyllo v. United States, 533 US. 27, 34–35, 40 (2001). With this description of Franky's nose and what it could detect, Justice Kagan is no doubt drawing an analogy to the thermal-imager from *Kyllo*. *See infra* notes 137–38 and accompanying text.
135. Jardines, 133 S. Ct. at 1418 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).
136. *Id.* at 1418–19.
137. *Id.* at 1419.
138. *Id.*
139. *Id.*
140. *Id.* at 1420.

rights by using a dog to sniff for narcotics.[141] Justice Alito found no evidence of trespass because he claimed the police officers' behavior did not deviate from either the implied license to approach a home or *Kentucky v. King*'s[142] "knock and talk" rule.[143] Justice Alito noted that the rule from *King* granted police officers an implied license to approach homes.[144] He also noted that, according to *King*, the police do not engage in a search when they walk up to front doors, even if they approach solely to gather evidence.[145] The dissenting opinion contended therefore that Detective Bartelt and Franky "did not exceed the scope of the license to approach" because they did not deviate from the license's established "spatial and temporal limits."[146] By approaching Mr. Jardines' home during the day, staying on the front yard's paved walkway, and only remaining on the property for a few minutes, the dissenting opinion found that the police did not do anything forbidden under *King*'s knock and talk rule or limited by the common law license to approach.[147] Justice Alito accused the majority of distorting the law to comport with its desired result and claimed that Anglo-American common law lacked any support whatsoever for their contentions.[148]

The dissent also dismissed Justice Kagan's claim that Franky was a unique technology whose use intruded on privacy rights.[149] Justice Alito claimed that law enforcement has been using dogs and their sense of smell for centuries.[150] He asserted that such use in no way violated Mr. Jardines' reasonable expectation of privacy because a reasonable person would be aware that the police use drug-sniffing dogs, and would assume that odors may emanate from a dwelling and spread to areas freely accessible to the public.[151] Thus, Justice Alito found no infringement on reasonable expectations of privacy and therefore no illegal search or Fourth Amendment violation.[152]

## III. ANALYSIS

The Supreme Court decided *Florida v. Jardines* by determining that the police dog's sniff search on the front porch—an area well within established curtilage—constituted a trespass under property law and therefore an illegal search in violation of the Fourth Amendment.[153] Although

141. *Id.* at 1426 (Alito, J., dissenting).
142. Kentucky v. King, 131 S. Ct. 1849 (2011).
143. *Jardines*, 133 S. Ct. at 1423; *King*, 131 S. Ct. at 1862.
144. *Jardines*, 133 S. Ct. at 1423.
145. *Id.*
146. *Id.* at 1422–23.
147. *Id.*
148. *Id.* at 1420–21.
149. *Id.* at 1425.
150. *Id.*
151. *Id.*
152. *Id.* at 1426.
153. *See id.* at 1414–16 (majority opinion).

*Jardines*' outcome differed from many of the Court's other dog-sniff cases, it did not overrule those previous holdings.[154] Despite *Jardines* finding in favor of the individual,[155] its easily distinguishable facts and distinct doctrinal approach ensure the continued viability of cases like *Place*, *Caballes*, and *Scott*.[156] Although Justice Kagan's analysis, if adopted by the majority, would not have upset *Place* or *Caballes*, its emphasis on privacy doctrine would have provided a broader examination of critical Fourth Amendment issues and probably overturned cases like *Scott*. Therefore, in order to provide the most robust Fourth Amendment search protections, the majority should have adopted Justice Kagan's approach and supplemented its property analysis with privacy considerations. Instead, the majority's decision to focus solely on property and trespass law raises concerns with the future application of privacy rights in Fourth Amendment cases. *Jardines*' purposeful neglect of the *Katz* standard leaves unanswered critical questions concerning what level of privacy an individual can expect in his or her dwelling and jeopardizes the Fourth Amendment rights of many of this country's citizens. Although the Court's decision was technically a victory for Mr. Jardines, *Jardines* fails to overturn questionable prior decisions or apply and ensure that the longstanding privacy doctrine maintains its importance in Fourth Amendment analysis.

### *A.* Jardines *Does Not Overrule* Place, Caballes, Scott, *or Other Similar Dog-Sniff Cases*

Contrary to *Illinois v. Caballes* and *United States v. Scott*, *Florida v. Jardines* found in favor of the individual claiming a Fourth Amendment violation.[157] *Jardines* achieved this result by focusing on the fact that the search occurred in a constitutionally protected location and by employing property law instead of privacy doctrine.[158] However, *Jardines* did not invalidate the privacy approach taken by *Place*, *Caballes*, and *Scott*, nor did it overrule their holdings.[159] *Jardines* is therefore best understood as a

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154. First, *Jardines* makes no mention in its opinion about overruling prior case law. Second, the facts and situation in *Jardines* are not analogous to the facts from other cases because those cases did not concern privately owned homes surrounded by curtilage. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) (concerning rented apartments without curtilage or property rights).

155. *See Jardines*, 133 S. Ct. at 1417–18 (concluding that the police engaged in an illegal search and affirming Florida's Supreme Court ruling in favor of Mr. Jardines).

156. *Compare Jardines*, 133 S. Ct. at 1414–15 (examining curtilage rights and private homes), *with* Illinois v. Caballes, 543 U.S. 405, 406–09 (2005) (looking at automobiles on public roads), United States v. Place, 462 U.S. 696, 697–700 (1983) (involving luggage in airports), *and Scott*, 610 F.3d at 1012, 1016 (concerning apartments where the residents are not protected by property rights).

157. *See Caballes*, 543 U.S. at 409; *Scott*, 610 F.3d at 1018. The Court in *Place* ruled in favor of the individual, but absent an improper seizure—"the seizure of respondent's luggage was unreasonable under the Fourth Amendment"—would not have done so. *Place*, 462 U.S. at 707, 710 ("Therefore, we conclude that . . . exposure of respondent's luggage . . . to a trained canine [] did not constitute a 'search' within the meaning of the Fourth Amendment.").

158. *Jardines*, 133 S. Ct. at 1417–18.

159. *Id.* at 1414.

location-specific refinement of the dog-sniff doctrine that *Place* and related cases advanced.

*Place* held that a warrantless dog sniff did not violate the Fourth Amendment.[160] The Court, using *Katz*'s reasonable expectation of privacy test, determined that the dog sniff in question was not an unreasonable invasion of privacy because it occurred in the very public realm of an airport and because the sniff search did not expose the private contents of the suitcase for public display.[161] *Jardines* held that a dog sniff was unconstitutional, but the critical difference between the two cases is that in *Jardines* the sniff occurred within the home's curtilage boundaries and violated property rights.[162] The majority in *Jardines* determined that unlike a dog sniff of a suitcase in a public airport, which implicated privacy doctrine, a sniff search occurring within the boundaries of curtilage implicated property law and activated Fourth Amendment protections.[163] However, *Jardines*' use of different doctrinal analysis does not void the constitutionality of dog sniffs aimed at luggage or reverse *Place*'s holding. Rather, it highlights the underlying factual differences between the two cases and demonstrates the different possible outcomes when using property law and privacy-rights analysis.

The Court in *Caballes* found that police use of a narcotics dog did not violate Fourth Amendment protections when the dog sniffed the exterior of an automobile that had been lawfully pulled over on a public road.[164] The public and exposed location was critical to the Court's conclusion, as was the fact that the dog sniff only revealed the presence of contraband.[165] Because open roads do not hide a vehicle or its occupant, and because there is no right to possess contraband, the Court concluded that a dog sniff of the exterior of a car did not violate the driver's reasonable expectation of privacy.[166] *Caballes*, like *Place*, relied on privacy doctrine and remains good law because its facts do not align with *Jardines*' or allow for application of a similar property analysis.[167]

*Jardines* does not upset the Supreme Court's general dog-sniff jurisprudence, epitomized by *Place* and *Caballes*, nor does it upset the lower courts' decisions about dog sniffs aimed at multi-unit dwellings.[168] This is because the Court in *Jardines* emphasized location and focused on the fact that the police trespassed and illegally searched for drugs from within the curtilage.[169] The facts from the prior apartment cases are

160. *Place*, 462 U.S. at 707.
161. *Id.* at 706–07.
162. *Jardines*, 133 S. Ct. at 1414.
163. *Id.* at 1414–16.
164. Illinois v. Caballes, 543 U.S. 405, 410 (2005).
165. *Id.* at 409–10.
166. *Id.*
167. *Id.* at 408–09.
168. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010).
169. Florida v. Jardines, 133 S. Ct. 1409, 1415–16 (2013).

not analogous; the courts have held that the Fourth Amendment does not protect hallways and common areas of multi-unit residences, and that the police do not trespass or exceed the scope of their license to approach when they enter those areas.[170] Not only do apartments and similar dwellings lack protection from trespass, but also their openness and close proximity diminish residents' privacy expectations both inside the dwelling and in hallways and common areas outside.[171] *Jardines*, with its different fact pattern, does not overrule prior apartment cases or question their holdings.[172] However, *Jardines* did present the Court with an opportunity to reevaluate the dubious holdings and privacy analyses of those older cases. The fact that the Court did not seize the opportunity to do so is a serious oversight and shortcoming that leaves the *Jardines* ruling lacking in critical analysis.

### *B. The Majority's Analysis Is Insufficiently Developed*

Justice Scalia wrote that his use of trespass law "keeps easy cases easy."[173] This sentiment might explain why the majority's opinion is oversimplified and under-inclusive. Trespass law is only one way to decide Fourth Amendment cases[174] and its tenets are often debatable.[175] *Jardines*' facts may arguably lend themselves to a straightforward, "baseline[,] . . . [and] easy"[176] application of trespass law, but contrary to the majority's contention, the Court should have also engaged in a privacy analysis.[177] Privacy rights are crucial to a complete Fourth Amendment analysis.[178] Especially because the home is an area of heightened privacy protections,[179] the majority should have supplemented its property law analysis with an examination of privacy expectations. Justice Scalia readily admits that "[a]t the Amendment's 'very core' stands 'the right . . . to retreat into [your] own home and there be free from unreasonable governmental intrusion.'"[180] To be free from intrusion is precisely what it means to have privacy, and therefore the home—the most

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170. *See supra* note 73 and accompanying text.

171. *Id.*

172. *See supra* notes 154, 156 and accompanying text.

173. *Jardines*, 133 S. Ct. at 1417.

174. *Id.* at 1414. Justice Scalia noted that property and trespass law is one way—but not the only way—to address Fourth Amendment violations. *Id.* He acknowledged that the *Katz* privacy standard "add[s] to the baseline" of the Fourth Amendment's protections. *Id.*

175. *See, e.g.*, *id.* at 1420–24 (Alito, J., dissenting).

176. *Id.* at 1417 (majority opinion).

177. *Id.* ("[W]e need not decide whether the officers[] . . . violated [Mr. Jardines'] expectation of privacy under *Katz*.").

178. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 649 (Cal. 1994) ("[T]he right to privacy [is] 'an important American heritage and essential to the fundamental rights guaranteed by the . . . Fourth . . . Amendment[] to the U.S. Constitution.'"); *see supra* note 28 and accompanying text.

179. Serr, *supra* note 6, at 593.

180. *Jardines*, 133 S. Ct. at 1414 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

highly private locus[181]—is deserving of the greatest Fourth Amendment protections and a thorough application of privacy doctrine.[182] The majority's purposeful disregard of *Katz* and privacy renders its opinion incomplete and fails to extend search protections to all citizens. Had the majority employed a privacy analysis, the Court could have ensured equal application of the Fourth Amendment for all citizens by reasserting that the home, no matter what its physical or structural characteristics, receives the greatest Fourth Amendment protections.

Justice Kagan, noting that privacy interests would have just as easily decided this case, filled the majority's void.[183] She argued that the Miami-Dade Police Department violated Mr. Jardines' reasonable expectation of privacy when it used a trained narcotics dog to "reveal within the confines of a home what they could not otherwise" have observed.[184] To reach this conclusion, Justice Kagan appropriately based her privacy analysis off the Court's decision in *Kyllo*.[185] She accurately compared *Jardines'* narcotic-sniffing dog to *Kyllo*'s thermal-imager, noting that drug-sniffing dogs are highly specialized pieces of equipment unavailable to the public. [186] The concurring opinion concluded that the use of such technology to smell into an individual's home violated a reasonable expectation of privacy just like the use of a thermal-imager to see into the home violated reasonable privacy expectations.[187]

Additionally, Justice Kagan's opinion impliedly acknowledged the important distinction between the target of a search and the location of a search.[188] *Kyllo* explained that the search's target ought to be examined because it may have privacy rights associated with it.[189] Contrarily, *Jones* held that it was only necessary to determine if a trespass occurred at the search's location, and concluded that there was no need to examine whether the search's target was entitled to a reasonable expectation of privacy.[190] Justice Kagan's concurring opinion in *Jardines* rightly applied *Kyllo*'s approach. It considered the search's target and explained that there is the presumption that when the police target a residence—or even "the entrance to [a dwelling]"—privacy rights apply and the protections of the Fourth Amendment are in full force.[191] By adopting *Kyllo*'s approach and rationale, Justice Kagan realized and emphasized the im-

181. *Id.*
182. *See id.*
183. *Id.* at 1418 (Kagan, J., concurring).
184. *Id.* at 1419.
185. *Id.*
186. *Id.*
187. *Id.*
188. *See id.* at 1418.
189. *See* Kyllo v. United States, 533 U.S. 27, 33–34, 40 (2001).
190. United States v. Jones, 132 S. Ct. 945, 950 (2012).
191. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring) (quoting *Kyllo*, 533 U.S. at 40) (internal quotation marks omitted).

portance of including a privacy-rights analysis when deciding Fourth Amendment search cases.[192]

*Jardines*' majority should have examined the *Katz* doctrine and *Kyllo*'s privacy analysis because both are relevant when examining Fourth Amendment protections for the home. Thankfully, Justice Kagan's concurring opinion picked up where the majority left off, managed to provide a straightforward application of privacy doctrine, and made "an 'easy cas[e] easy' twice over."[193] Although the majority's property and trespass approach upheld Fourth Amendment rights, the holding is incomplete because of the failure to adequately address all of the critical elements of a Fourth Amendment case. As a result, the majority runs the risk that *Jardines* will eventually come to signify that the privacy analysis is of secondary importance or that its examination is only required if the trespass standard is not met.[194]

### *C. The Majority's Holding Is Problematic Because It Raises Practical and Social Concerns and Potentially Limits Critical Constitutional Protections*

*Jardines* held that the police conducted an illegal search, but the opinion does not strengthen Fourth Amendment protections. The majority's decision to pursue only a property and trespass analysis threatens to diminish *Katz*'s longstanding and critical privacy doctrine. As a result, Justice Scalia may have taken an "easy"[195] case and "produce[d] inferior law."[196] By refusing to examine whether Mr. Jardines had a reasonable expectation of privacy at the doorstep of his home, the Court created two problems. First, its narrow focus on property law produced uncertainty and practical problems with future application of Fourth Amendment protections for residences. Second, by failing to examine privacy rights and address the implications and holdings of the lower courts' prior dog-sniff cases, the Court perpetuated a troubling application of Fourth Amendment jurisprudence that fails to apply constitutional protections equally to all individuals.

#### 1. Practical Questions Are Left Unanswered

The majority's singular focus on property and trespass law created a narrow holding that will be difficult to apply in future cases when dog sniffs are aimed at a home. For example, what if, instead of Franky sniffing from Mr. Jardines' front porch, he was an extraordinarily talented

192. *Id.* at 1419–20.

193. *Id.* at 1420 (alteration in original) (quoting *id.* at 1417 (majority opinion)).

194. In fact, *Jardines* is the second Supreme Court decision in as many years to ignore a privacy analysis in favor of the old property and trespass standard. *United States v. Jones*, 132 S. Ct. 945, 949 (2012), is the other case decided using property rights. Therefore, *Jardines* could be interpreted as reinforcing this trend.

195. *Jardines*, 133 S. Ct. at 1417 (majority opinion).

196. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

drug-sniffing dog and could detect odors from the street? Or, what if technology advances to the point where it becomes possible to conduct drug searches of homes from public areas? *Kyllo* might provide some guidance,[197] but *Place* and *Caballes* might contravene *Kyllo*.[198] Because there is no reasonable expectation of privacy in contraband,[199] and because a drug-dog's sniff search would only reveal drugs, those questions become complicated. Regardless of what their answers might be, and although the home would still be the target of the search, the change in location from where the police conduct the search would render *Jardines*' narrow focus on property and trespass law incapable of providing answers. Justice Kagan's privacy-rights framework would be much better suited to tackling those complex questions and is certainly easier to apply when the facts from other cases do not exactly align with those from *Jardines*.[200]

Another problem with the majority's opinion is that its analysis only relied on the physical characteristics of Mr. Jardines' property.[201] Mr. Jardines was only afforded Fourth Amendment protection in this case because he lived in a single-family detached house with a front porch and a surrounding yard.[202] Consequently, the majority's fact-specific analysis cannot answer what would have happened had Mr. Jardines been living in an apartment when the police brought a drug-dog to his front door. Certainly a curtilage analysis would be inapplicable, and a trespass analysis would fail to address the Fourth Amendment's critical privacy concerns and seemingly guarantee victory for the state.[203] However, a privacy analysis could resolve whether the police officers' search violated the Fourth Amendment. Yet, the majority in *Jardines* purposely avoided discussing privacy rights.[204] Would a dog sniff search of an apartment from outside its door be permissible? Many older cases hold that it would be.[205] But, even though *Jardines* emphasized a residence's special protected status,[206] the majority's analysis cannot answer whether apartments—despite also being places of residence—would be afforded similar heightened protections.

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197. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001). *Kyllo*'s facts are similar to that hypothetical, and the Court held that a thermal-imager used from a public road to peer into a home was an unconstitutional invasion of privacy rights. *Id.* at 40.

198. Both cases held that sniffs by drug-dogs in public areas did not violate reasonable expectations of privacy because they did not reveal intimate details otherwise hidden from public view. *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

199. *Caballes*, 543 U.S. at 408.

200. *See* Jardines, 133 S. Ct. at 1418–20 (Kagan, J., concurring).

201. *Id.* at 1414 (majority opinion).

202. *Id.*

203. *See supra* note 73.

204. *Jardines*, 133 S. Ct. at 1417 (noting that "we need not decide . . . expectation of privacy . . . .").

205. *See supra* note 73.

206. *Jardines*, 133 S. Ct. at 1414–15.

*Jardines*' narrow and fact-specific decision is therefore only relevant to cases with nearly identical facts and does not adequately advance Fourth Amendment interpretation. As a result, it produces no broadly applicable rule and provides only limited guidance. Broader holdings and definitions of *search* are generally better because they are "fairer, more regular, [and] more constitutionally reasonable . . . [and because they] reduce[] the opportunities for official arbitrariness, discretion, and discrimination."[207] By failing to provide a broadly applicable interpretation of Fourth Amendment rights for when dog sniffs are aimed at dwellings, *Jardines* leaves lower courts largely without guidance when faced with similar but not easily comparable cases.

2. Social and Constitutional Concerns

The second major problem with the majority's analysis is that it did not adequately address the privacy rights inherent to all places of residence[208] or consider their impact on a dwelling regardless of its physical or economic nature. This lack of a privacy analysis allows for the perpetuation of troubling constitutional inequalities and threatens to limit application of *Katz*'s reasonable expectation of privacy standard.

Although the majority recognized that at the "very core" of the Fourth Amendment stands an individual's right to retreat into the home and "there be free from unreasonable governmental intrusion,"[209] its opinion did not extend that protection to all citizens. Under Justice Scalia's property analysis, only citizens living in places with curtilage—i.e., most privately owned single-family homes—are afforded Fourth Amendment protection from police dogs sniffing for narcotics.[210] Unlike *Kyllo*, which was decided based on the target of the search,[211] the Court relied on the location of the search in *Jardines*.[212] Justice Scalia reasoned that the police violated Mr. Jardines' Fourth Amendment rights because they searched from a specific location—his front porch.[213] However, the Court should have decided *Jardines* by examining the target of the

207. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994).

208. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001); United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).

209. *Jardines*, 133 S. Ct. at 1414 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).

210. *Id.* at 1416.

211. *See Kyllo*, 533 U.S. at 34. *Kyllo* was decided based on the target of the search. *Id.* Because the target was the home, and the Fourth Amendment affords the greatest protection to the home, the Court deemed the search illegal. *Id.* Because the police did not commit a trespass, the search's location was irrelevant, and it would not have made any difference had the police used the thermal-imager from an airplane, satellite, or the neighbor's house next door. *Id.*

212. *Jardines*, 133 S. Ct. at 1416–17.

213. *Id.* at 1417 ("Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. . . . That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.").

search, which is what Justice Kagan's concurring opinion advocated. That is, the Court should have decided the case based on the fact that the police searched Mr. Jardines' home.

Justice Scalia's narrow focus on location instead of target risks diminishing the Fourth Amendment rights of citizens who do not live in stand-alone houses.[214] When the police aim searches at the home, the courts often determine the applicability of Fourth Amendment protections by looking at the dwelling's physical characteristics.[215] Because of this, structure becomes a decisive factor in the level of protection afforded to individuals, and Fourth Amendment rights become highly correlated to economic class.[216] This results in an application of the Fourth Amendment that favors those who have the financial ability to afford private homes.[217] This, in turn, offers wealthier citizens greater protection than poorer citizens.[218] "Privacy follows space . . . people with money have more space than people without" and therefore are granted the heightened privacy protections that go along with their additional space and curtilage.[219] Poorer and younger people generally are unable to afford private homes and more often live in apartments.[220] As a result, they do not have curtilage or property rights and the Fourth Amendment does not prohibit the police from conducting searches at their front doors.[221]

This ensuing disparity in Fourth Amendment protections is cause for concern. The Fourth Amendment should not "protect[] only those persons who can afford to live in a single-family residence with no surrounding common space."[222] Instead, the Fourth Amendment must protect all people from unwarranted governmental intrusion.[223] Failure to provide such protection would grant greater Fourth Amendment protections to those "who are more financially successful,"[224] those who are older, those with a larger family, those who are less transient, and those who do not live in a high-density urban environment. The text of the Fourth Amendment does not differentiate between property owners and renters or between single-family homes and multi-unit dwellings; it affords all people the same level of protection from governmental intrusion.[225] *Jardines*, by failing to focus on the target of the search—the home—and instead basing its ruling on the location of the search—the

214. *See* Mayer, *supra* note 2, at 1045.
215. *See supra* note 73.
216. Mayer, *supra* note 2, at 1045.
217. *Id.*
218. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).
219. *Id.* at 1270.
220. *Id.*
221. *See supra* note 73.
222. United States v. Roby, 122 F.3d 1120, 1127 (8th Cir. 1997) (Heaney, J., dissenting).
223. Mayer, *supra* note 2, at 1045.
224. *Id.*
225. *Id.*; U.S. CONST. amend. IV.

curtilage—improperly shifts the focus of Fourth Amendment protections and threatens to greatly diminish the cherished, heightened, and long-established privacy rights that accompany homes.[226] At least in this and similar contexts, the target of the search is more important than the location from which it occurs. After all, the Fourth Amendment does not protect places; it protects people and objects.[227]

*Jardines*' failure to address privacy concerns and extend full Fourth Amendment protections to all citizens regardless of what type of home they live in has serious constitutional ramifications. It also creates bad law and propagates the unfortunate precedent of limiting Fourth Amendment privacy analysis. Although fluidity and flux often characterize the Fourth Amendment,[228] *Jardines* strays too far by totally neglecting privacy analysis. Trespass law, while certainly a traditional and valid means of determining whether an illegal search has occurred, "need[s] to be supplemented to deal with" the privacy concerns brought on by new technology (such as drug-dogs) and changing social norms.[229] Justice Scalia may contend that *Katz* is still good law,[230] but *Jardines* makes it unclear whether he and several other Justices think it is important or applicable. What is clear is that a potential result of limiting privacy doctrine, and of propagating bad law in general, is that courts may simply avoid addressing rights deemed unworthy of careful diagnosis.[231] *Jardines* risks advancing "a rule that is unrepresentative" of how future cases should be decided, and "distort[s] . . . the nature of [the] controvers[y]" concerning Fourth Amendment search analysis.[232]

## CONCLUSION

*Florida v. Jardines* reached the right result but should have taken a different approach to get there. The Court correctly concluded that the police engaged in an unlawful search, but the opinion unfortunately relied on property and trespass law instead of *Katz*'s reasonable expectation of privacy standard.[233] The majority's specific and unapologetic dismissal of *Katz*'s critical privacy considerations[234] resulted in a failure to overrule questionable cases, did not create a clear and broadly applicable rule, and perpetuated a standard that allows for an unequal application of Fourth Amendment protections. Furthermore, by relegating *Katz*'s privacy analysis to a secondary position behind a property analy-

226. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

227. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . . ."); Katz v. United States, 389 U.S. 347, 351 (1967).

228. *See* Amar, *supra* note 207, at 757–58.

229. *Id.* at 798.

230. *Jardines*, 133 S. Ct. at 1417.

231. Marceau, *supra* note 15, at 755.

232. Schauer, *supra* note 196, at 900, 905.

233. *Jardines*, 133 S. Ct. at 1417.

234. *Id.*

sis, the Court is potentially signaling that privacy rights are of diminished significance or that their analysis is unnecessary. Although Justice Kagan's concurring opinion reminds us that *Katz* and privacy rights are as important as ever and could have easily decided *Jardines*,[235] her opinion does not set the legal standard.

*Jardines*' trespass analysis rightly reaffirms the home's unique and highly protected status and ensures that residents are free from government searches that violate property interests.[236] However, segregation of property and privacy doctrine within the realm of the Fourth Amendment "forecloses consideration of the totality of a police-citizen interaction."[237] Consequently, "the quality of the resultant constitutional rights" is negatively impacted.[238] *Florida v. Jardines* is an example of this phenomenon. The Fourth Amendment may have originally relied solely on property and trespass law,[239] but analysis today requires examination of the reasonable expectation of privacy standard.[240] After all, as the Second Circuit in *United States v. Thomas*[241] concluded, "[t]he very fact that a person is in his own home raises a reasonable inference that he intends to have privacy."[242] The *Jardines* decision may protect the home from trespass and inappropriate physical intrusions, but it does not include the necessary analysis required to definitively address and answer Fourth Amendment privacy concerns. More troubling still, the *Jardines* decision does not ensure that the same rights are available to all citizens regardless of the physical or structural nature of their residence.

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235. *Id.* at 1418–20 (Kagan, J., concurring).
236. *Id.* at 1417 (majority opinion).
237. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 464 (2012).
238. *Id.* at 409.
239. *Jardines*, 133 S. Ct. at 1414.
240. Serr, *supra* note 6, at 587–89.
241. 757 F.2d 1359 (2d Cir. 1985).
242. *Id.* at 1366 (alteration in original) (quoting United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980)) (internal quotation mark omitted).

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